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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GEORGE MERENDON et al., Defendants and Appellants.	D074192 (Super. Ct. No. FSB1501338)

APPEALS from judgments of the Superior Court of San Bernardino County, Harold T. Wilson, Judge. Affirmed in part; reversed in part; remanded for resentencing.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant George Merendon.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Alfred Mosqueda.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Arlene A. Sevidal and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Following their joint jury trial, George Merendon and Alfred Mosqueda were convicted of possession of methamphetamine for sale. (Health & Saf. Code, § 11378.) Mosqueda was also convicted of transportation of methamphetamine for sale. (*Id*., § 11379, subd. (a).) In addition, the jury found true gang enhancement allegations attached to each count. (Pen. Code, § 186.22, subd. (b)(1)(A).)[1]

Defendants raise numerous issues on appeal, contending: (1) the arresting officers interrogated Mosqueda without administering the warnings mandated by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and, therefore, the trial court should have excluded any evidence of incriminating statements that Mosqueda made during the alleged interrogation; (2) substantial evidence did not support the gang enhancement findings; (3) the prosecution's gang expert improperly opined about defendants' intent in order to prove the gang enhancements; (4) the prosecution's gang expert relayed case-specific hearsay to the jury, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and defendants' rights under the confrontation clause; (5) the trial court gave various erroneous jury instructions; (6) the cumulative effect of the trial court's errors violated defendants' constitutional right to a fair trial; (7) one of Merendon's prison prior sentencing enhancements must be stricken because the conviction giving rise to the

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1 All further statutory references are to the Penal Code, unless otherwise noted.

enhancement (from case No. FSB802994) has been redesignated as a misdemeanor pursuant to Proposition 47; (8) Merendon's sentencing enhancement under Health and Safety Code section 11370, subdivision (c) must be stricken because it is based on a conviction that, due to recent legislative amendments, will no longer support that enhancement; and (9) Mosqueda is entitled to 736 days of presentence custody credit (§§ 2900.5, 4019), not 609 days as reflected in the abstract of judgment.

After briefing concluded, Mosqueda also sought and obtained permission to file a supplemental brief regarding the impact of Senate Bill 1393, effective January 1, 2019, which amended sections 667 and 1385 to give trial courts discretion to strike five-year prior serious felony enhancements. In this case, the trial court imposed a five-year enhancement to Mosqueda's sentence for a prior serious felony conviction (from case No. SCR42211), as mandated by the prior versions of sections 667 and 1385 that were in effect at the time of Mosqueda's sentencing. Mosqueda now argues, and the Attorney General concedes, that Senate Bill 1393 applies retroactively to all cases that were not final as of the effective date of the statutory amendment, and requests that we remand the matter so that the trial court may exercise its discretion and resentence Mosqueda in accordance with the amended versions of sections 667 and 1385.

For reasons we will discuss, we conclude that Merendon's prison prior sentencing enhancement based on his conviction in case No. FSB802994 must be stricken because his conviction in that case has been redesignated as a misdemeanor. We conclude that Merendon's sentencing enhancement under Health and Safety Code section 11370, subdivision (c) must also be stricken due to the recent amendments to that statute.

Further, we agree with the parties that Senate Bill 1393 applies retroactively to cases in which the judgment of conviction was not final when Senate Bill 1393 went into effect on January 1, 2019, and requires us to remand Mosqueda's sentence for resentencing. Finally, we conclude that Mosqueda is entitled to a presentence custody credit of 736 days. Otherwise, we conclude that the trial court did not err or, alternatively, any asserted error was harmless.

Accordingly, we vacate defendants' sentences so that they can be resentenced in accordance with the directions in this opinion. Further, we direct the trial court to amend the abstract of judgment for Mosqueda to state that he is entitled to 736 days of presentence custody credit, consisting of 368 days of credit for actual time served and 368 days of conduct credit, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, we affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Motel Surveillance Operation and Vehicle Searches*

On the evening of April 17, 2015, Sergeant Michael Martinez, Deputy Sheriff Carlos Godoy, and Detective Tony Garcia of the San Bernardino County Sheriff's Department, as well as Probation Officer Hakim Stegal, conducted a surveillance operation at a motel in an area of San Bernardino known for its gang and drug use activity. The purpose of the operation was to locate an individual wanted by the probation department. During the course of the surveillance the officers observed defendants—who were not the focus of the operation—exit Room 224, the motel room in

which the surveillance target was believed to be located. Defendants spoke with one another outside the room, after which Merendon went back in and Mosqueda left the motel.

Deputy Godoy followed Mosqueda's vehicle and pulled him over for committing a traffic violation. Mosqueda spoke quickly, fidgeted, and had a white coating on his tongue, which suggested that he was under the influence of a controlled substance. While exiting the vehicle, Mosqueda placed his hands near a folded knife on the driver's seat, which raised safety concerns for Godoy. Godoy handcuffed and searched Mosqueda, finding one gram of methamphetamine in his right pants pocket.

Detective Garcia arrived at the traffic stop and detained Mosqueda while Godoy searched the vehicle. Mosqueda was "looking around" and "fidgeting," so Garcia asked, "why he was so nervous." In response, Mosqueda said, "I have shit in the back." Immediately after Mosqueda made this statement, Godoy returned from his search of the vehicle with a 30-gallon trash bag he had found on the back seat, inside of which were scales, methamphetamine pipes, baggies, a blue bandana, and four bindles containing 39.92 grams, or $700-900 worth, of methamphetamine. Godoy did not hear the conversation between Garcia and Mosqueda, which occurred while he was searching the vehicle.

As the traffic stop and vehicle search were taking place, Mosqueda's brother (Arthur) and two companions arrived at the motel that the police had been—and were still—surveilling. One of the three new arrivals (the police could not identify which individual) entered Room 224 and then returned to the vehicle in which he had arrived.

Sergeant Martinez followed the vehicle as it exited the parking lot, conducted a traffic stop of the vehicle, and found drug paraphernalia inside the vehicle.

2. *The Motel Room Search*

Detective Garcia returned to the motel and, together with Probation Officer Stegal, searched Room 224. Inside the room they found methamphetamine pipes and baggies; Merendon was sprawled on the bed. The police also found a safe underneath the bed that contained a scale and 18.71 grams, or $350-500 worth, of methamphetamine.

A cardboard box of paperwork, which had "ESR," "Riva," and other gang references written on it, was found underneath the bed as well. One paper had "East Side Riva" written on one side and a poem written on the reverse side, which read in pertinent part as follows: "A soldier raised in the ghetto, slums on the run, packing a gun, just having some fun. Selling them drugs, for all them thugs. Out there showing Sureño love." Another paper had "George Merendon, AKA Playboy" written on one side and a ledger of names and dollar amounts on the reverse side that, according to Detective Garcia, was a pay/owe sheet used to keep track of drug sales. "Riverside Inland 13," "East Side Riva," and other gang references were written on the pay/owe sheet.

3. *The Charges*

Defendants were arrested and charged by information with one count of possession of a controlled substance for sale, in violation of Health and Safety Code section 11378 (count 1). Mosqueda was charged with an additional count of transportation of a controlled substance for sale, in violation of Health and Safety Code

section 11379, subdivision (a) (count 2).[2] The information alleged that defendants committed the charged crimes for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in criminal conduct by gang members, under section 186.22, subdivision (b)(1)(A).

4. *The Prosecution Case*

At trial, the prosecution elicited testimony from Detective Garcia, who had detained Mosqueda during the vehicle search and searched Room 224. Before Garcia took the stand, Mosqueda moved to preclude him from testifying about Mosqueda's statement that he had "shit in the back" of his vehicle. According to Mosqueda, Garcia's questioning about Mosqueda's apparent nervousness constituted a custodial interrogation undertaken without first administering the requisite warnings under *Miranda*, *supra*, 384 U.S. 436. The court denied Mosqueda's motion, finding that Garcia's inquiries were "conversational in nature." The court further noted that Garcia's question stemmed from "officer safety" concerns, given that Mosqueda had just recently placed his hand near a knife.

The People also elicited testimony from Sergeant Martinez, who testified as the prosecution's gang expert. Martinez testified that the Mexican Mafia is a prison gang that consists primarily of members of Southern California's Hispanic street gangs. Although the Mexican Mafia operates inside prison, it controls the activities of its members' street

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2 The information also charged defendants with one count of street terrorism, in violation of section 186.22, subdivision (a). However, the trial court granted the prosecution's motion to dismiss that charge and renumbered the remaining charges, as reflected above.

gangs outside prison through force, fear, and intimidation. A Sureño refers to Hispanic street gangs that align themselves with the Mexican Mafia. According to Martinez, Sureño gang members associate with the color blue and common Sureño signs and symbols include "SUR," the number 13, and an image of two bars with three dots. The Mexican Mafia asks individuals who are involved in narcotics sales both inside and outside prison to pay it a "tax" or "donation," and there are "consequences for people" who do not pay the tithe.

Sergeant Martinez testified that West Side Verdugo (WSV) is one of the Sureño gangs and the largest gang in San Bernardino County, with over 1,000 members. According to Martinez, the primary activities of WSV include murder, extortion, witness intimidation, narcotics sales, weapons violations, carjackings, robberies, burglaries, and identity theft. Martinez testified that he believed Mosqueda was a member of WSV because he had tattoos of gang symbols on his body, including the word "Verdugo" on his right arm. Further, Martinez testified that "at least four to five" of Mosqueda's family members, including his brother Arthur, were members of WSV.

Martinez then described East Side Riva (ESR) as another Sureño gang that operates in Riverside and has over 500 members. ESR's primary activities include murder, extortion, witness intimidation, narcotics sales, weapons violations, carjackings, robberies, burglaries, and identity theft. "ESR," the number 13, and the image of a bell (the Riverside city logo) are common ESR signs and symbols. Martinez testified that he believed Merendon was a member of ESR due to the gang signs and symbols found in Room 224. Further, police searched Merendon's cell after he was arrested and found

papers that had gang signs and symbols written on them. Merendon also had tattoos on his body of "ES Riva," "East," "Riva," a bell, and two bars with three dots.

Martinez explained that ESR and WSV have worked together as allied gangs since approximately 2006, primarily to conduct illegal narcotics transactions. According to Martinez, members of different Sureño gangs sometimes work together because they "answer to a bigger entity, that being the Mexican Mafia."

In order to establish the pattern of criminal gang activity necessary to prove the charged gang enhancements, Martinez opined about four predicate offenses purportedly committed by WSV and ESR members. In particular, he testified as follows:

- Michael Bustamante was a member of WSV and was convicted of possession for sale of a controlled substance in case No. FSB1204006. Martinez based this testimony on a certified record of conviction introduced into evidence and his "personal contacts" with Michael Bustamante.

- Anthony Mosqueda (Mosqueda's nephew) was a member of WSV and was convicted of possession for sale of cocaine in case No. FSB1003151. Martinez based this testimony on a certified record of conviction introduced into evidence and his familiarity with Anthony Mosqueda.

- Mark Gray was a member of ESR and was convicted of burglary in case No. FWV1401993. Martinez based this testimony on his "personal contacts" with Mark Gray and "an investigation that [he was] involved in where [Mark Gray] was a named suspect."

- Clement Escalante was a member of WSV; Daniel Murguia, Juan Figueroa, Humberto Guillermo, and John Thompson were "members of criminal street gangs, specifically East Side Riva and West Side Verdugo"; and the five foregoing individuals were convicted (in order) of witness intimidation, extortion, assault, and street terrorism, in case No. RIF1302041. Martinez based this testimony on his "review of the investigation" and a conversation with "the investigating officer who [was] familiar with all of the individuals that were involved in this crime."

5. *Conviction, Sentencing, and Appeal*

The jury found Merendon guilty of possession of methamphetamine for sale and Mosqueda guilty of possession and transportation of methamphetamine for sale. The jury also found true the gang enhancement allegations attached to each count.

Defendants waived their rights to a jury trial on their prior convictions and admitted the following allegations: (1) for Merendon—one prior drug-related conviction under Health and Safety Code section 11378 (case No. RIF115016) and two prison priors for the drug-related conviction (case No. RIF115016) and attempted grand theft (case No. FSB802994); and (2) for Mosqueda—one prison prior for possession of a firearm by a felon (case No. FSB0700007). Further, the court found true the allegation that Mosqueda suffered one prior strike conviction and one serious felony conviction for assault with a firearm (case No. CR42211).

The trial court sentenced Merendon to an aggregate term of 11 years, calculated as follows: the upper term of 3 years for possession of methamphetamine for sale, plus 3 years for the gang enhancement (§ 186.22, subd. (b)(1)(A)), 3 years for the prior drug-

related conviction (former Health & Saf. Code, § 11370.2, subd. (c)),[3] and 2 years for the prison priors (§ 667.5, subd. (b)). It sentenced Mosqueda to an aggregate term of 12 years, calculated as follows: the middle term of 3 years for transportation of methamphetamine for sale, plus 3 years for the gang enhancement (§ 186.22, subd. (b)(1)(A)), 5 years for the prior serious felony conviction (§ 667.5, subd. (a)(1)), and 1 year for the prison prior (§ 667.5, subd. (b)).[4]

DISCUSSION

1. *Miranda Violation*

In the trial court, Mosqueda moved to suppress the statement he had made to the police regarding the "shit in the back" of his vehicle, on grounds that he was in police custody and had not been advised of his rights under *Miranda, supra,* 384 U.S. 436. The trial court denied the motion to suppress, finding that the police were engaged in conversational dialogue with Mosqueda when he made the statement at issue. For the following reasons, we conclude that substantial evidence supports this determination and,

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3 The trial court mistakenly cited former Health and Safety Code section 11370.2, subdivision (a) as the statutory provision authorizing a three-year enhancement for Merendon's prior drug-related conviction. However, Health and Safety Code section 11370.2, subdivision (c) is the correct statutory provision that provides for an enhancement if a defendant is convicted of violating Health and Safety Code section 11378 and has a qualifying prior conviction. For purposes of this opinion, we will refer to Health and Safety Code section 11370.2, subdivision (c) when applicable.

4 The trial court sentenced Mosqueda to the middle term of 2 years for possession of methamphetamine for sale, but stayed the sentence pursuant to section 654. Further, the court struck Mosqueda's prior strike and appears to have stricken one of Mosqueda's prison priors for sentencing purposes. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.)

therefore, find no *Miranda* violation. In the alternative, we conclude that any purported error admitting Mosqueda's statement was harmless beyond a reasonable doubt.

To safeguard a defendant's Fifth Amendment right against self-incrimination, a person questioned by police after being "taken into custody or otherwise deprived of his freedom of action in any significant way. . . . [M]ust [first] be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda, supra,* 384 U.S. at p. 444.) The prophylactic *Miranda* protections are triggered only if the suspect is both (1) in a custodial setting, and (2) under the threat or influence of an interrogation. (*People v. Avila* (1999) 75 Cal.App.4th 416, 418.) Statements obtained in violation of a suspect's *Miranda* rights are not admissible to prove his or her guilt in a criminal trial. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 429.)

The trial court made no express findings regarding Mosqueda's custodial status, but we have little trouble concluding (as the trial court seems to have assumed) that Mosqueda was in custody when he made the challenged statement. As the arresting officers testified at trial, Deputy Godoy handcuffed Mosqueda as he exited his vehicle. The officers did not remove those handcuffs at any point during the roadside encounter, including when Detective Garcia questioned Mosqueda about his nervousness. The People contend that handcuffing is not dispositive of a suspect's custodial status, a proposition with which we agree. (*People v. Davidson* (2013) 221 Cal.App.4th 966, 972 (*Davidson*).) Even so, handcuffing "is a distinguishing feature of a formal arrest" that curtails freedom of movement and weighs in favor of a custodial finding. (*People v.*

Pilster (2006) 138 Cal.App.4th 1395, 1404-1405; see *People v. Sheppard* (1967) 250 Cal.App.2d 736, 739.) Moreover, Garcia questioned Mosqueda about his nervousness only *after* Godoy had searched him and found methamphetamine on him. "A reasonable person in defendant's position would know that possession of methamphetamine . . . is . . . a crime, and that arrest would likely follow." (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 37 [suspect in custody after police found methamphetamine on his person]; see *People v. Farris* (1981) 120 Cal.App.3d 51, 57 [suspect in custody after police found stolen jewelry in his possession].)

The trial court focused on the crucial question whether Detective Garcia was *interrogating* Mosqueda when he made the admission. The term "interrogation" refers both to express questioning and its functional equivalent, including "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 (*Innis*).) "However, not all police questioning of a person in custody constitutes interrogation" for purposes of *Miranda*. (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 86 (*Andreasen*).) "[T]he *Miranda* requirements are generally not implicated when the police ask questions related to safety concerns that arise during the arrest or booking process. [Citations.] Similarly, casual conversations or 'smalltalk' unrelated to the offense do not typically constitute a *Miranda* interrogation." (*Id.* at p. 87.) In reviewing a claimed *Miranda* violation, " 'we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from

undisputed facts and facts found by the trial court whether the challenged statement was legally obtained.' " (*People v. Thomas* (2012) 211 Cal.App.4th 987, 1006.)

Detective Garcia asked Mosqueda a single question—why he was nervous—that neither mentioned the drug-related offenses of which Mosqueda was charged nor related to the facts underlying those charges. (*Andreasen, supra,* 214 Cal.App.4th at p. 89 [casual conversations with suspect were not interrogative, in that they "never mentioned the offense or distinctions between right and wrong"].) "Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officer[] should have known that it was reasonably likely that [defendant] would . . . respond" with an incriminating admission. (*Innis, supra,* 446 U.S. at p. 303.)

Further, the trial court determined that the officer's lone question was rooted in the officer's safety concerns, and we conclude that substantial evidence supports this finding. In this respect, the facts are analogous to *Davidson, supra,* 221 Cal.App.4th 966, in which our colleagues in the Second District found there was no custodial interrogation under substantially similar circumstances. In that case, a police officer responding to a report of a stolen motorcycle saw a suspect pushing a motorcycle and ordered the suspect to put the motorcycle down. (*Id.* at p. 969.) The suspect put a flat-blade screwdriver on the motorcycle seat and was acting "hanky," so the responding officer handcuffed the suspect out of concern for his safety. (*Ibid.*) On these facts, the *Davidson* court concluded that the officer did not custodially interrogate the suspect by asking whether the motorcycle belonged to him, given that the officer's "single question was asked to confirm or dispel

the officer's suspicions" about whether the suspect would flee or present a risk of danger to the officer. (*Id.* at p. 972.)

Similarly, Mosqueda was "looking around a lot," fidgeting, and exhibited quick speech patterns, very shortly after he had placed his hand near a knife on the driver's seat of his vehicle. His erratic behaviors and his placement of a hand near a knife in his vehicle suggest that the purpose of the arresting officer's question was to ensure that he and his fellow officer remained safe during the arrest. (*Davidson, supra,* 221 Cal.App.4th at p. 969.) For all these reasons, we conclude that, under the substantial evidence standard of review, the questioning was not an interrogation under *Miranda*.

Even if the officer had engaged in a custodial interrogation when he asked Mosqueda why he was nervous, the admission of Mosqueda's response at trial was harmless under the standard of review articulated in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*In re Z.A.* (2012) 207 Cal.App.4th 1401, 1422 [applying *Chapman* review to admission of statements procured in violation of *Miranda*].) Under the *Chapman* standard of review, reversal is warranted unless the People can show that the error was "harmless beyond a reasonable doubt." (*Chapman,* at p. 24.)

Mosqueda claims prejudice because the vehicle he drove was registered to someone else[5] and his incriminating admission was purportedly "the most compelling evidence" that Mosqueda knew there was methamphetamine in the vehicle. (*People v.*

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5 The arresting officers testified that the vehicle Mosqueda drove that night belonged to an individual named "Stephanie," but provided no further details about the owner of the vehicle.

LaCross (2001) 91 Cal.App.4th 182, 185 [transportation of a controlled substance requires showing that defendant transported controlled substance " 'with knowledge of its presence and illegal character' "].) We disagree. Overwhelming evidence established Mosqueda's knowledge of the methamphetamine's presence. He was the driver and sole occupant of the vehicle on the night in question. The bag containing the methamphetamine was not hidden, but rather was in plain sight on the back seat. Police observed Mosqueda earlier that evening visiting Room 224, where more methamphetamine was later found. And, as the gang expert testified, it is unlikely a vehicle owner would leave methamphetamine in plain view in her vehicle and permit another person to borrow that vehicle.

On this record, we are satisfied that ample evidence established Mosqueda's knowledge of the methamphetamine in the vehicle he drove. As such, any alleged error in admitting evidence of Mosqueda's statement was harmless beyond a reasonable doubt. (See *People v. Case* (2018) 5 Cal.5th 1, 22-23 [admission of statements obtained in violation of *Miranda* harmless beyond a reasonable doubt].)

2. *Sufficiency of the Gang Enhancement Evidence*

Next, defendants argue that the evidence was insufficient to establish the gang enhancements attached to their convictions. They do not dispute the prosecution's claims that they were members of the WSV and ESR gangs, but contend there was no *additional* evidence demonstrating that they committed the charged offenses "for the benefit of, at the direction of, or in association with" a criminal street gang, or specifically intended "to promote, further, or assist in any criminal conduct by gang members." (§ 186.22,

subd. (b)(1).) As discussed below, however, substantial evidence—including, but not limited to defendants' gang memberships—supported the gang enhancement findings.

a. *Legal Principles*

Section 186.22 provides a sentencing enhancement for persons who commit felonies "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A criminal street gang is defined as any "ongoing organization, association, or group of three or more persons" that shares a common name or common identifying sign or symbol, has as one of its "primary activities" the commission of one or more enumerated offenses; and "whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) A " 'pattern of criminal gang activity' " may be established by proving two or more criminal convictions by gang members for certain enumerated offenses (§ 186.22, subd. (e)), known as predicate offenses.

"On review, the question of whether the prosecution presented sufficient evidence to support a gang enhancement under section 186.22, subdivision (b)(1) is a question of fact reviewed under the substantial evidence standard. [Citation.] When applying the substantial evidence standard, 'the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every

fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]' " [Citation.]' " (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1366 (*Garcia*).)

b. *Application*

Defendants contend the prosecution elicited no evidence, apart from their gang memberships and "speculative" expert testimony, to prove that they committed the charged offenses for gang-related purposes. We find no merit to this argument.

At trial, the prosecution's gang expert testified, based on his 17-year career with the San Bernardino Sheriff's Department and his investigations of WSV and ESR, that the primary activities of the WSV and ESR gangs include narcotics sales—activities closely related to the conduct that defendants undertook in this case. (See *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 425 [gang enhancement affirmed due to similarities between charged offenses and gang's primary activities].) He also explained that gangs are generally aware of individuals who sell narcotics in and around their turf, expect to receive a percentage of any profits from those sales, and will discipline

narcotics traffickers if they sell narcotics without paying tithes to the gangs, thereby making it more probable that defendants undertook these activities in furtherance of their gangs or, at minimum, paid their gangs a portion of the profits derived from their narcotics sales. Further, the gang expert testified that members of WSV and ESR elevate their internal gang standing by generating revenue through narcotics sales. (See *People v. Pettie* (2017) 16 Cal.App.5th 23, 51 [substantial evidence supported gang enhancement, where expert testified that gang members enhance their reputations by committing crimes].)

Additionally, the gang expert testified that WSV and ESR have had a working relationship since 2006 "primarily based upon narcotics transactions . . . ." On the evening of the surveillance operation in this case, officers observed defendants, who were members of the allied WSV and ESR gangs, conversing with one another at a motel in which methamphetamine and a pay/owe sheet were recovered. They also observed a second WSV gang member (Arthur) and his companions arrive at the motel that same evening. A meeting of multiple allied gang members under these circumstances supports a conclusion that defendants engaged in the charged crimes for gang-related purposes. (See *Garcia*, *supra*, 244 Cal.App.4th at pp. 1369-1370 [substantial evidence supported gang enhancement attached to conviction of defendants who belonged to different gangs, yet committed charged crimes in concert].)

Finally, the gang-related writings and symbolic references that police recovered at the arrest scenes support the gang enhancement findings. (See *People v. Albillar* (2010) 51 Cal.4th 47, 62 (*Albillar*) [substantial evidence that crime was gang-related because the

crime scene "was 'saturated' with gang paraphernalia"].) In Room 224 officers discovered a box and paperwork covered in gang terminology, including a poem that seemingly linked Merendon's gang membership with narcotics sales. Further, in the vehicle Mosqueda was driving the officers found a blue bandana together with the methamphetamine and drug paraphernalia that they recovered. According to the gang expert, WSV gang members associate with and wear blue to signify their gang membership.

Because the record contains substantial and convincing evidence that defendants committed the charged crimes for gang-related purposes, we conclude there was sufficient evidence to sustain the jury's gang enhancement findings.

3. *Expert Opinion Regarding Defendants' Intent*

Defendants also claim the trial court erred by allowing the prosecution's gang expert to opine about their specific intent to "promote, further, or assist" in criminal conduct by gang members. (§ 186.22, subd. (b)(1).) According to defendants, a gang expert may testify about the gang-related intent of defendants in a properly framed *hypothetical*, but not the intent of the *specific* defendants in the case at hand, which defendants claim is of no assistance to a jury. The People, on the other hand, claim that gang experts may opine about the intent of specific defendants and, in any event, the gang expert in this case did not opine about defendants' intent.[6]

For the reasons discussed below, we reject defendants' argument because, assuming the trial court erred in permitting the gang expect to testify about the defendants' intent, any such error was harmless.

a. *Legal Principles*

California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id.*, § 801.) "Testimony in the form of an opinion that is otherwise admissible is not

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6 The People also contend Mosqueda forfeited his improper expert opinion argument by failing to timely object to the gang expert's testimony or join Merendon's objection in the trial court. We address the argument to preclude a later claim of ineffective assistance of counsel. (*People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

objectionable because it embraces the ultimate issue to be decided by the trier of fact." (*Id.*, § 805.) We review rulings on the admissibility of expert testimony for abuse of discretion. (See *People v. Nan Hui Jo* (2017) 15 Cal.App.5th 1128, 1176.)

b. *Application*

During the colloquy in dispute, the prosecution asked its gang expert whether he had an opinion as to whether the charged crimes were "committed with the specific intent to promote, further or assist in any criminal conduct by gang members?" The gang expert testified, "yes," and stated, "it did benefit and promote the three [gangs] -- East Side Riva, West Side Verdugo and the Sureño gangs." As noted, defendants claim this testimony was improper because it was of no assistance to the jury, which was as competent as the gang expert to weigh the evidence and draw conclusions about defendants' intent. In support of this argument, defendants rely on *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), and *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*).

In *Killebrew*, the Court of Appeal reversed a jury's determination that the defendant, an alleged gang member, feloniously conspired to possess a handgun. (*Killebrew, supra*, 103 Cal.App.4th at pp. 647-649.) At trial, the prosecution's gang expert had opined as "to the subjective knowledge and intent" of the defendant and his fellow co-defendants, rather than "the expectations of gang members in general" under similar circumstances. (*Id.* at p. 658, italics omitted.) The Court of Appeal concluded that such testimony improperly "informed the jury of [the expert witness'] belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the

trier of fact." (*Ibid.*) Therefore, the *Killebrew* court concluded that the gang expert's testimony was "irrelevant" and "erroneously admitted." (*Id.* at pp. 658-659.)

Nearly a decade later, the California Supreme Court addressed the propriety of gang expert testimony in *Vang*. At trial, the prosecution relayed a set of hypothetical facts tracking an assault that took place and asked its gang expert to opine on whether he believed the assault described in the hypothetical was committed for gang-related reasons. (*Vang*, *supra*, 52 Cal.4th at pp. 1042-1043.) On the initial appeal, this court concluded that the trial court had erred in allowing such testimony, which we believed enabled the prosecution to circumvent the *Killebrew* rule. (*Vang*, at p. 1045.) The Supreme Court, however, disagreed. It held that the trial court did not err when it "permitted the expert to give an opinion whether an assault would have had a gang purpose in response to hypothetical questions. . . ." (*Id.* at p. 1049.) According to the Supreme Court, such expert testimony regarding a hypothetical scenario, so long as it is " 'rooted in facts shown by the evidence,' " is generally permissible and can "support [a] jury's finding that [a] crime . . . [is] gang related." (*Id.* at p. 1045.)

Because the gang expert in *Vang* did not testify about the intent of the specific defendants, but "only responded to hypothetical questions," the Supreme Court did not endorse or reject the *Killebrew* court's conclusion that testimony regarding the gang-related intent of *specific* individuals is impermissible. (*Vang*, *supra*, 52 Cal.4th at p. 1048, fn. 4.) Instead, the Court *assumed* for purposes of the appeal that such testimony was improper. (*Ibid.*) But the Supreme Court also explained in dicta that "in some circumstances, expert testimony regarding the specific defendants might be proper."

(*Ibid.*) In support of this statement, the Supreme Court cited *People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509, an earlier decision in which the Court of Appeal had concluded that a trial court did not abuse its discretion by permitting a gang expert to testify that the specific defendants in that case had "acted for the benefit of" gangs.

In the wake of *Killebrew* and *Vang*, courts have reached varying and sometimes-conflicting conclusions on the admissibility of expert testimony regarding the gang-related motivations of *specific* defendants. (Compare *People v Williams* (2009) 170 Cal.App.4th 587, 621 [court did not err by permitting expert to testify "that the [charged] crimes were for the purpose of benefitting the gang"] with *People v. Perez* (2017) 18 Cal.App.5th 598, 607 ["While a gang expert is prohibited from opining on a defendant's specific intent when committing a crime, the prosecution can ask hypothetical questions based on the evidence presented to the jury whether the alleged crime was committed to benefit a gang and whether the hypothetical perpetrator harbored the requisite specific intent."] and *People v. Ewing* (2016) 244 Cal.App.4th 359, 382 (*Ewing*) ["As the People concede and we agree, asking [the prosecution's gang expert] whether defendant specifically committed the alleged crimes for the benefit of the gang was improper."].)

In this case we need not decide whether, and under what circumstances, gang expert testimony regarding the intent of specific defendants is admissible because even assuming the trial court erred by admitting such testimony, any error was harmless. As we have already discussed, there was abundant evidence other than the contested expert testimony to support the jury's gang enhancement findings, including but not limited to

evidence regarding the gangs' primary activities, the manner by which gang members attain elevated status within gangs, the consequences that befall individuals who sell narcotics in and around gang territories without paying the gangs, the history of cooperation between the WSV and ESR gangs, the number of gang members present at the motel in an area known for its gang activity, and the gang symbols and paraphernalia found at both arrest scenes.

Accordingly, we conclude that any purported error in permitting the gang expert to testify regarding defendants' intent was harmless because it was not "reasonably probable" the jury would have found the gang enhancement not true had the alleged error not occurred. (*Ewing*, *supra*, 244 Cal.App.4th at p. 382 [erroneous admission of gang expert testimony regarding intent subject to standard of review for errors of state law].)

4. *Testimonial Hearsay*

Defendants next contend the trial court impermissibly allowed the prosecution's gang expert to relay case-specific, testimonial hearsay to the jury to prove one of the predicate offenses underpinning the gang enhancements, in violation of *Sanchez*, *supra*, 63 Cal.4th 665 and their rights under the Sixth Amendment to the federal Constitution. The People claim the gang expert testified only about the general basis of his opinion, without relaying hearsay to the jury. They further contend that his testimony pertaining to the gang membership of individuals who committed the predicate offense at issue was

neither "case-specific" under *Sanchez, supra*, 63 Cal.4th 665, nor "testimonial" for purposes of the Sixth Amendment.[7]

In *Sanchez, supra*, 63 Cal.4th 665, the California Supreme Court addressed the extent to which an expert witness may relate hearsay on which he or she bases an expert opinion.[8] The *Sanchez* court explained that state evidence law "has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Sanchez, supra*, 63 Cal.4th at p. 676.) By contrast, "an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*)

As the Supreme Court recognized, however, "the line between the two ha[d] . . . become blurred" over time due to decisions in which courts "attempted to avoid

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7 The People also contend defendants waived their argument by failing to timely object to the gang expert's testimony. In response, defendants argue they did not forfeit their argument because the California Supreme Court issued *Sanchez, supra*, 63 Cal.4th 665, after the defendants were convicted and sentenced. The Courts of Appeal have reached differing conclusions on this issue (*People v. Veamatahau* (2018) 24 Cal.App.5th 68, 72, fn. 7 (*Veamatahau*) [collecting cases]), and it is currently before our Supreme Court (*People v. Perez* (2018) 22 Cal.App.5th 201, review granted July 18, 2018, S248730.) Pending further guidance from the Supreme Court, we find the opinions declining to find forfeiture persuasive. (*People v. Flint* (2018) 22 Cal.App.5th 983, 996-998; *Veamatahau*, at p. 72; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1283; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507-508; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7, review granted March 22, 2017, S239442 (*Meraz*).) We therefore conclude that defendants did not forfeit their argument by failing to object.

8 The Evidence Code defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Unless an exception applies, hearsay evidence is generally inadmissible. (*Id.*, subd. (b).)

hearsay issues by concluding that statements related by experts [were] not hearsay because they '[went] only to the basis of [the expert's] opinion and [were] not [to] be considered for their truth.' " (*Sanchez, supra*, 63 Cal.4th at pp. 678-681.) *Sanchez* rejected this line of cases and the not-for-the-truth rationale on which they relied, concluding that the value of an expert witness' opinion necessarily depends on the truth of his or her assumptions. (*Id.* at pp. 682-683.) In so doing, the Supreme Court announced the following rule governing expert witness testimony: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id.* at p. 686.)

Proceeding to address the relationship between hearsay and the Sixth Amendment, the *Sanchez* court explained that "[t]he admission of expert testimony is governed not only by state evidence law, but also by the Sixth Amendment's confrontation clause, which provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .' " (*Sanchez*, *supra*, 63 Cal.4th at pp. 678-680.) Admission of *testimonial* hearsay against a criminal defendant—i.e., statements that are "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony"—generally "violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing." (*Id.* at pp. 680, 689.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step inquiry"—first, determine whether the statement at

issue is hearsay that does not fall within a recognized exception and, second, decide whether the statement is testimonial hearsay that may violate the confrontation clause. (*Ibid.*)

Here, defendants contend the prosecution's gang expert relayed case-specific, testimonial hearsay to the jury when he discussed the predicate offense involving Daniel Murguia, Juan Figueroa, Humberto Guillermo, John Thompson, and Clement Escalante. In the testimony in dispute, the gang expert stated that these five individuals were convicted of various assault-related offenses. The expert further stated that, "in preparation for [his] testimony, [he] reviewed this predicate offense and [he] contacted the investigating officer who [was] familiar with all of the individuals that were involved in this crime. And based on [his] conversation with him and [his] review of the investigation, [he] believe[d] all of [the perpetrators were] members of criminal street gangs, specifically East Side Riva and West Side Verdugo."

The Courts of Appeal are split on whether out-of-court statements offered to show that a non-party is a gang member who has committed a predicate offense are "case-specific" under *Sanchez*. Some courts, relying on the Supreme Court's statement that testimony is "case-specific" only if it relates "to the particular events and participants alleged to have been involved in the case being tried," (*Sanchez*, *supra*, 63 Cal.4th at p. 676), have characterized testimony pertaining to predicate offenses as "general background" testimony to which an expert may testify. (*Meraz*, *supra*, 6 Cal.App.5th at pp. 1174-1175; *People v. Blessett* (2018) 22 Cal.App.5th 903, 945, review granted August 8, 2018, S249250 [testimony about gang membership of individuals committing

predicate offenses not case-specific].) An opposing line of authority, however, suggests that such testimony is "case-specific" because it is used to prove an essential "element of either [a] gang crime or [a] gang enhancement." (*People v. Lara* (2017) 9 Cal.App.5th 296, 337; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 581-583, 587-589 (*Ochoa*) [out-of-court statements made by individuals involved in predicate offenses case-specific].)

Here, we need not weigh in on this issue because, as the People persuasively argue, the gang expert did not relay any hearsay to the jury. Rather, he testified only *generally* about the sources he consulted to form his opinion. Such testimony is permissible under *Sanchez*, which recognized that "an expert is entitled to explain to the jury the 'matter' upon which he relied, even if that matter would ordinarily be inadmissible." (*Sanchez, supra*, 63 Cal.4th at p. 679.) Indeed, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) This includes describing "the type or source of the matter relied upon," so long as he does not present, "as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Id*. at p. 686.) Defendants do not identify any *specific* out-of-court statements that the gang expert purportedly relayed to the jury, nor have we uncovered any such statements. Accordingly, we reject defendants' argument that the gang expert's testimony contravened *Sanchez*.

Even if we had concluded that the gang expert relayed impermissible hearsay to the jury, and that he did so in violation of defendants' rights under the confrontation clause of the Sixth Amendment, any such error was harmless beyond a reasonable doubt.

(See *People v. Penunuri* (2018) 5 Cal.5th 126, 158 [beyond-a-reasonable-doubt harmless error standard applies to confrontation clause violations].)

As discussed above, section 186.22, subdivision (e) requires proof of two enumerated offenses to prove a " 'pattern of criminal gang activity.' " In addition to the predicate offense involving Murguia, Figueroa, Guillermo, Thompson, and Escalante, the prosecution submitted certified records of conviction and elicited unchallenged expert testimony regarding two *different* predicate offenses committed by members of WSV (Michael Bustamante and Anthony Mosqueda). The evidence of these predicate offenses, standing alone, supported a finding that WSV engaged in a "pattern of criminal gang activity."

The gang expert testified about only one other predicate offense involving a member of ESR (Mark Gray). However, the prosecution may rely on a currently-charged crime to establish a " 'pattern of criminal gang activity' " for purposes of the gang enhancement statute. (See *People v. Loeun* (1997) 17 Cal.4th 1, 4-5, 8-14; *Ochoa*, *supra*, 7 Cal.App.5th at p. 586.) Here, there was no serious dispute that Merendon was a member of ESR and the offense for which he was charged—possession of a controlled substance for sale—constitutes a qualifying predicate offense under the gang enhancement statute. (§ 186.22, subd. (e)(4), Health & Saf. Code, § 11055, subd. (d)(2).) Further, the court instructed the jury it could use the current charges to determine whether ESR engaged in a "pattern of criminal gang activity." Thus, the evidence pertaining to Mark Gray's conviction, coupled with the evidence supporting Merendon's conviction in this action, supported a finding that ESR engaged in a "pattern of criminal gang activity."

Because the evidence established a "pattern of criminal gang activity" for both WSV and ESR, independent of the gang expert testimony in dispute, we conclude that any alleged error regarding the admissibility of case-specific hearsay was harmless beyond a reasonable doubt. (See *People v. Fiu* (2008) 165 Cal.App.4th 360, 388 [erroneous admission of evidence establishing predicate offense harmless due to evidence establishing other predicate offenses].)

5. *Instructional Errors*

Defendants identify numerous instances of alleged jury instruction error and contend that these asserted errors, individually and collectively, require reversal of defendants' convictions. We address each of defendants' claims in turn.

a. *Transportation with Intent to Sell*

As noted *ante*, the jury convicted Mosqueda of transporting methamphetamine for sale, in violation of Health and Safety Code section 11379. Prior to 2014, that statute did not require proof that the controlled substance at issue was being transported for the purpose of being sold. Mere transportation of a controlled substance, even if intended for personal use, could give rise to a conviction. (Former Health & Saf. Code, § 11379; Stats. 2011, ch. 15, § 174; *People v. Eastman* (1993) 13 Cal.App.4th 668, 673-677.)

Effective January 1, 2014, however, the Legislature amended the statute to define "transports" as "transports for sale." (Health & Saf. Code, § 11379, subds. (a) & (c).) "The amendment explicitly intended to criminalize the transportation of drugs for the purpose of sale and not the transportation of drugs for nonsales purposes such as personal use." (*People v. Eagle* (2016) 246 Cal.App.4th 275, 278 (*Eagle*); *People v. Martinez*

(2018) 4 Cal.5th 647, 655 (*Martinez*) ["The 2013 amendment to section 11379 . . . means that transportation of a controlled substance without intent to sell is no longer a distinct criminal offense."].)

Here, the court instructed the jury on the transportation for sale charge by using a pattern jury instruction, CALCRIM No. 2300.[9] Mosqueda contends this instruction did

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9 The court read CALCRIM No. 2300 in pertinent part as follows:

> The defendant . . . is charged in Count 2 with unlawfully transporting for sale methamphetamine in violation of Health and Safety Code Section 11379(a).
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant unlawfully transported a controlled substance;
>
> 2. The defendant knew of its presence;
>
> 3. The defendant knew of the substance's nature or character as a controlled substance;
>
> AND
>
> 4. The controlled substance was methamphetamine.
>
> 5. The controlled substance was in a usable amount.
>
> Selling for the purpose of this instruction means exchanging a substance for money, services, or anything of value.
>
> A person transports something if he or she carries or moved it from one location to another, even if the distance is short.

not sufficiently apprise the jury it must find that Mosqueda transported methamphetamine *with the intent to sell*. Mosqueda also claims the prosecution made statements during closing arguments that exacerbated the purported instructional error. For example, the prosecution informed the jury that "transportation" of a controlled substance "just means that [Mosqueda] was in a car and the car moved with a controlled substance. That's all it means." The prosecution further argued the "transportation" element of the charged offense was satisfied simply because Mosqueda's "vehicle [was] moving."

As an initial matter, the People claim that Mosqueda forfeited this instructional error argument by not objecting to the use of CALCRIM No. 2300 or requesting clarifying or amplifying instructions. But "it is well settled that no objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge." (*People v. Mil* (2012) 53 Cal.4th 400, 409.) Moreover, even if the forfeiture doctrine potentially were to apply, we would still address Mosqueda's argument "to forestall a claim of ineffective assistance of counsel." (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1014 (*Lua*).)

On the merits of the argument, the People contend CALCRIM No. 2300 adequately informed the jury of the intent requirement of Health and Safety Code section 11379 because it defined "selling" as "exchanging a substance for money, services, or anything of value." According to the People, this definition would be superfluous if there were no implied intent-to-sell requirement in the jury instruction.

But we have considerable doubt that CALCRIM No. 2300, standing alone, sufficiently apprises the jury about the specific intent element of the charged crime.

(See *Lua, supra,* 10 Cal.App.5th at p. 1016 ["[A]lthough CALCRIM No. 2300 tracks the language of section 11379, it is at best questionable whether, standing alone, the instruction adequately explains the specific intent element of the offense."].) Although the instruction states, at a general level, that the charged crime was transportation of a controlled substance "for sale," and defines the word "selling," it does not explicitly state that a defendant may be convicted only if the jury finds that he or she acted with the specific intent to sell the controlled substance that he or she transported.

This pattern instruction thus differs from CALCRIM No. 2302, which applies when the charged offense is possession of a controlled substance for sale. Both transportation and possession crimes require the prosecution to prove that a defendant has acted with the specific intent for the controlled substance at issue to be sold. (*People v. Ramos* (2016) 244 Cal.App.4th 99, 105.) Yet unlike CALCRIM No. 2300, CALCRIM No. 2302 memorializes that specific intent requirement, stating that a jury may only convict for possession of a controlled substance for sale if, "[w]hen the defendant possessed the controlled substance, (he/she) intended (to sell it/ [or] that someone else sell it)." (CALCRIM No. 2302 (Apr. 2018).) We believe a similar recitation of the specific intent requirement would substantially improve CALCRIM No. 2300.[10]

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10 For this reason, we join our colleagues in Division Two in calling for the Judicial Council of California to consider revising CALCRIM No. 2300. (See *Lua, supra,* 10 Cal.App.5th at p. 1016 ["[T]he Judicial Council of California, which promulgates the CALCRIM instructions, should consider conforming the standard instruction for transportation for sale offenses . . . to the instructions for other offenses with an analogous 'for sale' element."].)

We are further troubled that the prosecutor's statements to the jury likely exacerbated the confusion created by the language of the instruction. The prosecution could not establish that Mosqueda transported a controlled substance merely by showing that his vehicle was "moving," as the prosecution claimed. (See *Martinez*, *supra*, 4 Cal.5th at p. 655; *Eagle*, *supra*, 246 Cal.App.4th at p. 278.) Misstatements of the law made during closing arguments, such as the one here, can compound the effects of a trial court's instructional error. (See *People v. McCloud* (2017) 15 Cal.App.5th 948, 960 [prosecutor's statements during closing arguments exacerbated instructional error, where prosecutor "never told the jury the transportation must be for the purpose of sale"]; cf. *People v. Hajek and Vo.* (2014) 58 Cal.4th 1144, 1220, abrogated on another point by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 [" 'any theoretical possibility of confusion [may be] diminished by the parties' closing arguments"].)

Despite these concerns, we decline to disturb the judgment of conviction in this case. Assuming without deciding that the trial court committed instructional error, such error was harmless under any standard of review. As the Supreme Court explained in *People v. Wright* (2006) 40 Cal.4th 81, 98 (*Wright*), an instructional error is harmless where " 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' "

The trial court instructed the jury it could convict Mosqueda of possession of methamphetamine with intent to sell only if it found that "[w]hen the defendants possessed the controlled substance, they intended to sell it." After receiving this instruction, the validity of which Mosqueda has not challenged on appeal, the jury

convicted Mosqueda of possession of methamphetamine for sale. In so doing, the jury necessarily concluded that the methamphetamine found in the vehicle Mosqueda was driving—which formed the basis for both the possession and transportation charges—was intended for sales purposes. Because the jury concluded beyond a reasonable doubt that Mosqueda intended to sell the methamphetamine in the vehicle he drove, and not to use it for personal purposes, the alleged "instructional error was harmless under any standard of prejudice." (*Wright, supra*, 40 Cal.4th at p. 99.)

b. *Concurrence of Act and Intent*

Next, Merendon claims the trial court erred by failing to sua sponte instruct the jury with CALCRIM No. 252 ("Union of Act and Intent: General and Specific Intent Together"). That instruction reads in pertinent part as follows: "The crime[s] [(and/or) other allegation[s]] charged in Count[s] ____ require[s] proof of the union, or joint operation, of act and wrongful intent." (CALCRIM No. 252 (Apr. 2018).) Merendon argues the court's failure to provide this instruction relieved the prosecution of its "burden to prove the union, or joint operation of act and wrongful intent and mental state" as to both the charged offense and the gang enhancement.[11]

The People concede the trial court should have instructed the jury with CALCRIM No. 252. (*People v. Thiel* (2016) 5 Cal.App.5th 1201, 1208 [" 'The law imposes on a trial

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11 It is undisputed that both the charged offense and the gang enhancement require a showing of specific intent. (See *Lua, supra*, 10 Cal.App.5th at p. 1014 [transportation of a controlled substance for sale is a specific intent crime]; § 186.22 [gang enhancement requires a showing that defendant acted "with the specific intent to promote, further, or assist in any criminal conduct by gang members"].)

court the sua sponte duty to properly instruct the jury on the relevant law and, as such, requires the giving of a correct instruction regarding the intent necessary to commit the offense and the union between that intent and the defendant's act or conduct.' "].) Nevertheless, they contend the instructional error was harmless because the court's *other* instructions adequately informed the jury of the mental state or intent required to convict Merendon of the charged crime and to find the gang enhancement allegations true, as well as the requirement of concurrence between the act and mental state or intent.

We agree the trial court should have read the appropriate standard jury instruction explaining that the prosecution must prove a joint union, or joint operation, of act and wrongful intent. However, applying the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, we conclude that the error was harmless because it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 919 [applying *Watson* standard of review to claim that court failed to instruct jury on the concurrence of act and mental state or intent].)

Although the trial court did not read CALCRIM No. 252, it provided a panoply of other instructions regarding the mental intent requirements for the charged crime and the gang enhancement, as well as the concurrence between act and mental state or intent. (See *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1499 [" ' "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." [Citation.]' "].) Specifically, the trial court read CALCRIM No. 225 to the jury, as follows: "The People must prove not only that the defendant did

the acts charged, but also that he acted with a particular intent and/or mental state. The instructions for each crime explain the intent and/or mental state required." The court then read CALCRIM No. 2302 pertaining to the charged offense of possession with intent to sell, which stated that "[t]o prove that the defendants are guilty of this crime, the People must prove that . . . . [w]hen the defendants possessed the controlled substance, they intended to sell it . . . ." Further, the court read CALCRIM No. 1401, which stated that the jury could find the gang enhancement allegations true only if it concluded that "[t]he defendants intended to assist, further or promote criminal conduct by gang members."[12]

Under these circumstances, where the trial court read several instructions that explicitly set forth the mental state or intent required for the charged offense and sentencing enhancement, as well as the concurrence between act and intent or mental state, any purported instructional error was harmless. (See *People v. Hayden* (1994) 22 Cal.App.4th 48, 58 ["Although the 'concurrence of act and intent' instruction should have been given sua sponte, its omission was not prejudicial" because "[o]ther instructions . . . focused on the defendant's intent at the time of the [crime]"].)

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12 Merendon claims this instruction, though it articulated the mental state required to prove the gang enhancement, did not inform the jury that it must find that the mental state and act occurred *concurrently*. We reject this argument. The instruction explicitly cautioned the jury to consider evidence of gang activity for the purpose of "deciding whether[] [t]he defendant[s] acted with the intent, purpose and knowledge that are required to prove the gang-related enhancement charge."

c. *Gang Enhancement Instruction*

When instructing the jury on the gang enhancement allegations, the trial court read CALCRIM No. 1401, a pattern instruction that largely tracks the language of the gang enhancement statute, section 186.22, subdivision (b)(1). The instruction reads in pertinent part as follows: "To prove [the] allegation, the People must prove that: [¶] 1. The defendants committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; [¶] AND [¶] 2. The defendants intended to assist, further, or promote criminal conduct by gang members."

Merendon contends the trial court erred when delivering this instruction because it did not sua sponte provide a definition of the phrase, "in association with a criminal street gang." (See *People v. Rodriguez* (2002) 28 Cal.4th 543, 546-547 (*Rodriguez*) ["If . . . a word or phrase is used in a technical sense differing from its commonly understood meaning, clarifying instructions are appropriate and should be given on the court's own motion."].) In support of this argument, Merendon cites *Albillar*, *supra*, 51 Cal.4th 47, which, according to Merendon, defined the phrase "in association with a criminal street gang" in a technical manner to mean that a defendant "relie[s] on . . . common gang membership and the apparatus of the gang in committing" the charged crimes. (*Id.* at p. 60.) The People respond that *Albillar* did not define "in association with a criminal street gang" in a new or technical sense and, therefore, the trial court's use of CALCRIM No. 1401 adequately apprised the jury of the law governing gang enhancements.

In *Albillar*, a jury convicted three fellow gang members of the forcible rape of a minor and found true the allegation that the defendants had committed the crime in

association with a criminal street gang under section 186.22, subdivision (b). (*Albillar*, *supra*, 51 Cal.4th at p. 54.) On appeal, the Supreme Court concluded that substantial evidence established that the defendants had acted in concert and "relied on the gang's internal code to ensure that none of them would cooperate with the police, and on the gang's reputation to ensure that the victim did not contact the police." (*Id.* at pp. 61-62.) Thus, the court determined that the record "supported a finding that defendants relied on their common gang membership and the apparatus of the gang" to commit the charged crime and affirmed the jury's gang enhancement findings. (*Id.* at pp. 60, 62-63.)

In a concurring and dissenting opinion, Justice Werdegar critiqued the majority's reference to " 'common gang membership and the apparatus of the gang,' " expressing her view that the gang enhancement should be reversed. (*Albillar, supra*, 51 Cal.4th at pp. 72-73 (conc. & dis. opn. of Werdegar, J.).) According to Justice Werdegar, the evidence did not establish that the *gang*, as opposed to the *gang members* who committed the crime, was involved or even aware of the crime. (*Albillar*, at pp. 72-73 (conc. & dis. opn. of Werdegar, J.).) Justice Werdegar also believed that reversal was warranted because "the majority's interpretation [of the phrase, "in association with a criminal street gang"], whatever its merit, was not provided to the jury." (*Id.* at p. 73.)

There can be no dispute that Merendon bases his instructional error argument on Justice Werdegar's concurring and dissenting opinion in *Albillar*, not the majority opinion in that case. However, "a majority opinion stands on its own, and a private view expressed by a dissenting justice cannot be used to construe the majority opinion or to limit or affect its meaning unless the majority opinion expressly takes account of the

dissent." (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337.) The majority opinion in *Albillar* did not acknowledge or endorse Justice Werdegar's concurring and dissenting opinion and, on that basis alone we find Merendon's argument unpersuasive.

Further, we do not agree with the premise of Merendon's argument that *Albillar* adopted a new or unique definition of the phrase, "in association with a criminal street gang." Contrary to Merendon's claims, the *Albillar* court did not assign a technical definition to that language or hold that the prosecution is necessarily *required* to prove that criminal gang defendants "relied on their common gang membership and the apparatus of the gang in committing" the charged crimes to establish a gang enhancement. (*Albillar, supra,* 51 Cal.4th at p. 60.) Rather, *Albillar* simply described the evidence in the case and concluded that such evidence was sufficient to support a true finding on the gang enhancements that were charged.

Because defense counsel did not request instruction on the meaning of the phrase, "in association with a criminal street gang," and that phrase does not have a technical meaning that differs from the normal understanding attached to it, we conclude the court had no sua sponte duty to define "in association with a criminal street gang" for the jury. (*Rodriguez, supra,* 28 Cal.4th at pp. 546-547.)

6. *Cumulative Error*

Defendants contend that the cumulative effect of the trial court's alleged errors deprived them of a fair trial. " 'Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is

reasonably probable the jury would have reached a result more favorable to defendant in their absence." ' " (*People v. Mireles* (2018) 21 Cal.App.5th 237, 249.)

We have rejected all of defendants' claims of error, except for three such claims. As to those claims, we assumed error twice (*ante*, pts. III & V(a)), found error once (*ante*, pt. V(b)), and concluded that all three instances of actual or assumed error were harmless. But "[w]hether considered individually or cumulatively, these errors do not warrant reversal of the judgment." (*People v. Brooks* (2017) 3 Cal.5th 1, 82.)

7. *Sentencing and Presentence Custody Credit Errors*

a. *Merendon's Prison Prior Enhancement*

Merendon argues we must strike his prison prior enhancement based on his conviction in case No. FSB802994 because, while this appeal was pending, he petitioned to have that conviction redesignated as a misdemeanor under Proposition 47. Thus, he contends, his prior conviction is no longer a felony and cannot form the basis for a prison prior enhancement under section 667.5, subdivision (b).[13]

In *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), the Supreme Court addressed whether Proposition 47 authorizes the striking of a prison prior enhancement in a nonfinal appeal where, as here, the conviction underpinning the enhancement has been resentenced or redesignated as a misdemeanor. As the court noted, "Proposition 47 was

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13 A prison prior enhancement under section 667.5, subdivision (b) "requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Turner* (1993) 6 Cal.4th 559, 563.)

intended to broadly mitigate the collateral penal consequences of certain narcotics and larceny-related offenses so that they could be treated as a misdemeanor for all purposes . . . .' " (*Id.* at p. 883.) Further, under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) courts are to presume that "ameliorative changes [to criminal laws] are intended to 'apply to every case to which it constitutionally could apply . . . .' " (*Buycks*, at p. 881.) The Supreme Court concluded that, taken together, "Proposition 47 and the *Estrada* rule authorize striking [a prison prior] enhancement [in a non-final appeal] if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under" the procedures established by Proposition 47. (*Id.* at p. 888.)

The *Buycks* holding squarely applies here and requires that the prison prior sentencing enhancement based on Merendon's conviction in case No. FSB802994 be stricken. The judgment in this case is not final. (See *In re Gomez* (2009) 45 Cal.4th 650, 655 ["[A] case is final 'when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely petition has been finally decided.' "].) Further, Merendon successfully petitioned to have his Proposition 47-eligible prior conviction designated as a misdemeanor.[14] Because the "resentencing of [the] prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement"—that is,

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14 Merendon requested judicial notice of the petition for resentencing that he filed in case No. FSB802994 and the sentencing court's minute order granting that petition. We grant Merendon's request for judicial notice. (Evid. Code, § 452, subd. (d); *People v. Jones* (2016) 1 Cal.App.5th 221, 226, fn. 2 [taking judicial notice of minute order designating prison prior conviction as misdemeanor].)

Merendon's felony conviction—Merendon's prison prior enhancement based on his conviction in case No. FSB802994 must be stricken.[15] (*Buycks, supra*, 5 Cal.5th at p. 889.)

b. *Merendon's Enhancement for a Prior Drug-Related Conviction*

Health and Safety Code section 11370.2 establishes sentencing enhancements for certain enumerated crimes if a defendant has a prior conviction for a qualifying drug-related offense. At the time of sentencing, that statute required courts to impose a three-year enhancement on any defendant convicted of possession of a controlled substance for sale (Health & Saf. Code, § 11378) if he or she had a prior conviction for possessing or conspiring to possess a controlled substance for sale. (Former Health & Saf. Code, § 11370.2, subd. (c).) Because the jury in this case convicted Merendon of possessing methamphetamine for sale and Merendon admitted he had a prior conviction in case No. RIF115016 for possession of a controlled substance for sale, the trial court imposed a three-year enhancement to Merendon's sentence in accordance with the then-extant version of Health and Safety Code section 11370.2, subdivision (c).

However, during the pendency of this appeal, the Legislature enacted Senate Bill 180, effective January 1, 2018. (Stats. 2017, ch. 677, § 1.) Among other changes, this legislation removed prior convictions for possession of a controlled substance for sale from the list of qualifying convictions that give rise to a sentencing enhancement under Health and Safety Code section 11370.2. (Health and Saf. Code, § 11370.2,

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15 In light of our conclusion, we need not address Merendon's argument that a prospective-only application of Proposition 47 would violate his equal protection rights.

subd. (c).) In a supplemental brief, Merendon, citing the *Estrada* rule, asks this court to apply these legislative amendments retroactively and strike his three-year sentencing enhancement. The People concede these amendments apply retroactively.

In *People v. Millan* (2018) 20 Cal.App.5th 450, 454-456, our court concluded that the amendments to Health and Safety Code section 11370.2, subdivision (c) apply retroactively to cases involving non-final judgments of conviction. In accordance with *Millan*, we accept the People's concession and vacate and remand Merendon's sentence with instructions that the trial court strike the sentencing enhancement under Health and Safety Code section 11370.2, subdivision (c) and resentence Merendon.

c. *Mosqueda's Prior Serious Felony Enhancement / Senate Bill 1393*

On September 30, 2018, the Governor signed Senate Bill 1393, effective January 1, 2019, which amended sections 667 and 1385 to permit trial courts to exercise their discretion to strike or dismiss five-year prior serious felony enhancements in "furtherance of justice." (Stats. 2018, ch. 1013, §§ 1-2.) Previously, these statutes prohibited courts from striking such enhancements. (Former §§ 667, subd. (a)(1), 1385, subd. (b); see *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160 [former section 1385 "remove[d] from the trial court all discretion to strike the prior felony convictions, thus rendering imposition of a five-year enhancement for each such prior conviction a certainty"].)

After briefing concluded, we granted the parties permission to file supplemental briefs regarding the retroactive effect of Senate Bill 1393, if any, and whether we should vacate Mosqueda's sentence and remand the matter for resentencing. In his supplemental brief, Mosqueda contends Senate Bill 1393 reflects an ameliorative change in the law

that, in accordance with the *Estrada* rule, applies retroactively to all cases that are not yet final, including his own. The Attorney General concedes Senate Bill 1393 is an ameliorative change in the law that applies retroactively to all nonfinal cases and agrees that we should vacate Mosqueda's sentence and remand the matter for resentencing.

In *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972, Division Two of this District concluded that Senate Bill 1393 "applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final" on the effective date of the legislation. As the court explained, an amendatory statute like Senate Bill 1393 that lessens the punishment for a crime or vests the trial court with discretion to impose the same penalty or a lesser penalty is, absent evidence to the contrary, presumed to "retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective." (*Id.* at p. 972.) With Senate Bill 1393, the Legislature "did not expressly declare or in any way indicate that it did not intend Senate Bill 1393 to apply retroactively . . . ." (*Ibid.*) Thus, the Legislature intended Senate Bill 1393 to "apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final" when the legislation went into effect. (*Id.* at p. 973.) We agree with, and therefore adopt, the *Garcia* court's reasoning.

However, that conclusion does not end the inquiry, as we must now determine whether we should remand the matter to the trial court for resentencing. " '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it

lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.] But if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

The record does not reflect that the trial court assumed it had discretion to strike the prior serious felony enhancement. Nor is there any indication that the trial court "would not have exercised its discretion" even if it believed it had the ability to do so. (*McDaniels, supra*, 22 Cal.App.5th at p. 425.) On the contrary, the trial court in fact exercised its discretion to strike Mosqueda's prior strike, which arose out of the same conviction giving rise to his prior serious felony enhancement. As the court explained, the conviction giving rise to Mosqueda's prior strike (and prior serious felony enhancement) was over thirty years old and Mosqueda's subsequent criminal history involved "mostly property-type and drug-type crime" that were of a less serious nature. Further, the court sentenced Mosqueda to the mid-term for his transportation of methamphetamine for sale conviction and gang enhancement, finding "there [were] no aggravating factors that would apply to [the] case to increase the punishment."

On this record, we cannot conclude that the trial court clearly indicated it would decline to exercise its discretion to strike Mosqueda's prior serious felony enhancement.

Accordingly, we vacate Mosqueda's sentence and remand for resentencing. We express no opinion on how the trial court should exercise its discretion and instead reserve that matter for the trial court to decide in the first instance on remand.

d. *Mosqueda's Presentence Custody Credits*

Finally, Mosqueda contends that he is entitled to 736 days of presentence custody credit and the trial court undercalculated his presentence custody credit by 127 days. He requests that we correct the erroneous credit calculation. (See *People v. Cardenas* (2015) 239 Cal.App.4th 220, 234 [" 'A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered.' "].)

The People concede that Mosqueda is entitled to 736 days of presentence custody credit and request that we order the trial court to amend the abstract of judgment accordingly. We accept the People's concession and direct the trial court to amend the abstract of judgment to state that Mosqueda is entitled to 736 days of presentence custody credit, consisting of 368 days of credit for actual time served and 368 days of conduct credit. (See §§ 2900.5, 4019.) The trial court is further directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

DISPOSITION

Defendants' sentences are vacated so that they can be resentenced in accordance with the directions in this opinion. Further, we direct the trial court to amend the abstract of judgment as to Mosqueda to state that he is entitled to 736 days of presentence custody credit, consisting of 368 days of credit for actual time served and 368 days of conduct

credit, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, we affirm the judgments.

DATO, J.

WE CONCUR:

IRION, Acting P. J.

GUERRERO, J.